No. 14331

# UNITED STATES COURT OF APPEALS

## for the Ninth Circuit

ARTHUR A. ARNOLD, et al, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

## PETITION FOR REHEARING

To: THE HONORABLE HOMER T. BONE, *Circuit Judge*
THE HONORABLE WILLIAM E. ORR, *Circuit Judge*
THE HONORABLE WILLIAM T. HASTIE, *Circuit Judge*

FERGUSON & BURDELL
W. H. FERGUSON
W. WESSELHOEFT
DONALD McL. DAVIDSON
*Attorneys for Appellants*

1012 Northern Life Tower,
Seattle 1, Washington



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COME NOW ARTHUR ARNOLD et al, appellants herein and, aggrieved by this court's decision filed September 1, 1955, affirming the trial court in the granting of Appellee's motion for judgment on the pleadings, respectfully petition the above entitled department for a rehearing *en banc* under Rule 23 of the Rules of the 9th Circuit Court of Appeals.

The grounds on which this petition is based are as follows:

## I.

### Proximate Cause

The complaint alleges three phases of government negligence. The opinion disposes of the first two phases by reaching a conclusion on the pleadings with respect to proximate cause. Page 3 of the Opinion says:

> "In our opinion it was this recurrence of fire on the 1600 acre tract which was the sole proximate cause of the injury to appellants' property and that the risks, if any, created by the acts or omissions of the government prior to the containment of the fire in the 1600 acre area had terminated."

A footnote on that page then proceeds to recite case authorities on the subject of intervening cause. The court then holds as a matter of law on the pleadings that the acts and omissions discussed in parts 3 and 4 of appellants' Opening Brief[1] did not proximately cause the damage. It thus appears that the holding is grounded on the doctrine of intervening cause.

This holding is a surprise to all parties concerned in this action. The subject was not argued in any

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[1] (a) Failing to remove or eliminate combustibles on the right-of-way when it had reserved the right to do so; (R8)
(b) Failing to compel the railroad to take proper safety precautions when it had reserved the right to do so; (R8)
(c) Causing slash to accumulate on a portion of government property near the railroad right-of-way; (R8)
(d) On first receiving a report of fire, Floe sent insufficient men to control it; (R11)
(e) The men so sent took insufficient equipment with them (R11)
(f) When he received word from these men that the fire was out of control, Floe did not send sufficient additional men; (R11)
(g) Floe failed to follow the Fire Suppression Plan in combatting the blaze on the morning of August 7th. (R12)

brief. The decision is not in accord with Washington law which could have been brought to the court's attention, had this matter been raised in appellee's brief. Nor is there any case authority relieving the United States, negligent in a proprietary capacity, from liability arising therefrom, on the ground of an intervening cause, to-wit: the United States negligent in a governmental capacity. Finally, this holding could have an effect on the trial court which will be deciding the same issue in the trial between plaintiff-appellants and the defendant Port Angeles Western Railroad, which trial is being held in abeyance pending this appeal.

### (a) *Washington Law on intervening cause*

The Washington Supreme Court has become increasingly vehement in refusing to find as a matter of law that liability for certain acts and omissions has been negatived by an intervening act or omission. The rule as expressed in *McLeod v. Grant County School District,* 42 Wn. (2d) 316, 255 P. (2d) 360 (1953), is that in deciding on intervening negligence as a matter of law, the court must consider "whether such occurrences are so highly extraordinary or improbable as to be wholly beyond the range of expectability." See also *Danielson v. Pac. Tel. & Tel. Co.,* 41 Wn. (2d) 268, 248 P. (2d) 568 (1952).

In *Fleming v. Seattle,* 45 Wn. (2d) 477, 275 P. (2d) 904 (1954), the court in dealing with this question of foreseeability, sets the following rule:

> "Whether foreseeability is being considered from the standpoint of negligence or proximate cause, the pertinent inquiry is not whether the actual harm was of a particular kind which was

> expectable. Instead, the question is whether the actual harm fell within a general field of danger which should have been anticipated."

In the case of *Palin v. General Construction Company,* 147 WD 223, ..... P. (2d) ....., the opinion of which was filed on the same day as the opinion in this case, the Washington State Supreme Court used identical language in refusing to hold as a matter of law that an intervening criminal act was the proximate cause of a loss, saying at page 226:

> "We are satisfied that what happened here was in no way so extraordinary or improbable as to be outside the ambit of the reasonably foreseeable."

The court's opinion does not regard as extraordinary or improbable the neglect of the Forest Service men to use reasonable methods to control the fire within the 1600 acre tract. The opinion is, therefore, not supported by the Washington cases.

### (b) *Intervening Cause by the Same Wrongdoer*

The court holds that under the authority of the *Dalehite* case[2], the United States is not liable for the negligence of its servants acting in the capacity of public firemen. Then it applies the doctrine of intervening cause to cut off liability of the United States for negligent acts of its servants before they became public firemen. Thus, the United States, negligent in a governmental capacity, is regarded as an intervening cause avoiding liability of the United States for its servants acting in a proprietary capacity. An exhaustive search of the text authorities on municipal corporations and negligence

[2] *Dalehite v. United States,* 346 U. S. 15, 97 L. Ed. 1427, 73 S. Ct. 956 (1953).

has revealed to appellants no authority for such a holding. Its rationale is contrary to public policy. Every time a United States servant commits an act which is actionable under the Tort Claims Act, the United States will be on the outlook for an intervening cause. Unconscionable government employees will furtively but deliberately create such intervening causes.

The foregoing paragraph concedes, *arguendo,* that the Forest Service men in fighting the fire after the breakaway were acting in a governmental capacity. However, appellants strongly urge that in fact the Forest Service employees were at all times acting in a proprietary capacity. This argument is spelled out at length in both appellants' opening and reply briefs.

On the other hand, if the court adheres to the opinion that the Forest Service employees acted in a governmental capacity in fighting the fire in its later stages, it runs head-on into the following general rule:

> "The act of a third person will not amount to an intervening efficient cause when such person is merely performing a duty necessitated by, or resting on, the original wrongdoer." 65 C.J.S., p. 676.

### (c) *Wind as Intervening Cause*

It is possible that the court intended to hold that the intervening proximate cause of the damage to appellants' property was not the government's negligent refusal to employ available resources to extinguish the fire but was the fact of the wind which fanned the flames at the time of the breakaway.

If this was the court's position, we submit that it is erroneous.

In *Mensick v. Cascade Timber Co.,* 144 Wash. 528, 258 Pac. 323, the court considered assertions by the appellant-defendant to the effect that the damage was due "solely to the intervening of unusual, abnormal, unanticipated and unprecedented combinations of natural causes. . . ." In response thereto, the opinion said at page 538:

> "The above assertions are controverted by the facts that appellant had not cut the snags in the area to be burned and had not constructed a fire trail between the slashings on its land and respondent's property so as to reasonably protect it. Nor was there any gale which suddenly sprang up, such as was the case in the *Stephens* case, *supra,* largely relied upon by appellant, where the wind changed and blew from an exactly opposite direction very suddenly, and blew very violently. The same was true in hte *Lehman* case, *supra."*

The opinion of this court did not advert to that Washington case or any other Washington cases on this subject of intervening cause. The complaint alleges specifically that the wind causing the flare up was "of not unusual force in said area" (R. 15).

**(d)** ***Effect of Court's Holding on Subsequent Trial***

The appellants brought their action against the United States, the Port Angeles Western Railroad and Fibreboard Products, Inc. The case against defendants Railroad and Fibreboard is at issue and is being held in abeyance pending the outcome of this appeal. One of the issues at the trial between appellants and the defendant Port Angeles Western Railroad is the issue of intervening cause. On this

appeal, the issue was not raised in the briefs. The court raised it on its own accord. This holding, although not *ipso facto* binding on the trial court in an action between appellants and the other two defendants, will, nevertheless, affect the trial court's thinking on the issue.

Appellants do not contend either that this court should not raise issues on its own motion or that it should not make holdings which will affect the thinking of the trial court on subsequent actions involving one of the parties. Appellants do strenuously urge, however, that this court, having taken both steps at the same time, should grant to appellants a rehearing *en banc* in order that they may present their arguments on this major issue.

## II.

## Liability of Servient Owner

Because the opinion rested its decision primarily on the doctrine of intervening cause in conjunction with a holding that the Forest Service men in the latter stages of the conflagration were acting in a governmental capacity, it devoted little space to the allegations of earlier acts and omissions by the Forest Service employees.

Of paramount importance was the issue regarding the duty of a servient estate under facts as alleged in the amended complaint. The court disposes of this issue in one paragraph of the Rayonier opinion, quoting *Reed v. Allegheny Co.* (1938), 330 Penn. 300, 189 Atl. 187, and in one paragraph in the Arnhold opinion. The fact is that the *Reed* case holds that both dominant and servient owners are liable to a third party for damage occasioned by improper

maintenance of the easement. The language relied upon by the court is directed at the liability of the dominant owner to the servient owner, as a careful reading will disclose. That issue is not here involved. The *Reed* case is authority that both may be liable to a third party—the issue before the court in this case. The opinion does not refer to the subsequent decision cited in Appellee's Reply Brief[3] wherein the 5th Circuit held that an actual inspection and repair of a highway and railway intersection by a railway imposed liability upon it under Pennsylvania law, even though the right of way was actually owned by a separate but controlled operation —a clear holding that liability to third parties cannot be defeated by a mechanistic application of dominant-servient, landlord-tenant or licensee-licensor labels. As to third parties, the liability is the same, however different the rights of parties between themselves may be.

## III.

### Liability Imposed by State Statutes

In Appellant's Brief the statutes RCW 76.04.370 (Rem. Rev. Stat. 5807) and RCW 76.04.450 (Rem. Rev. Stat. 5818) are discussed together. In the latter statute entitled "Olympic Peninsula Area Protection" the court defines what shall constitute that area and then goes on to provide that "it shall be unlawful for any person to do any act which shall expose any of the forest or timber upon such land to the *hazard of fire*" (emphasis supplied). The former statute provides that "any land . . . covered

[3] *Conry v. B. & O. Railroad Company,* 209 F. (2d) 423, (CCA 3d 1953).

wholly or in part by inflammable debris . . . shall constitute a *fire hazard"* (emphasis supplied).

These statutes were not set out in the complaint or in Appellants' Opening Brief in an attempt to impose liability without fault, although the opinion appears to regard them as such an attempt. Quite t othe contrary, they are quoted to impose civil liability for negligence. The recent case of *State v. Canyon Lumber Corp,* 146 WD 648, ..... P. (2d) ..... (Sup. Ct. Wash. *En Banc,* 1955) holds RCW 76.04.370 to be constitutional and not a statute imposing liability without fault.

The proposition is glaringly simple:

1. Leaving slash on the ground is defined by the State Legislature as a fire hazard.
2. A statute makes it unlawful to expose the Olympic Peninsula Forest to fire hazards.
3. The violation of a statute is negligence per se.[4]

By simply discussing these two statutes as an attempt to impose liability without fault and in ignoring the applicability of these statutes to the issue of negligence of the Forest Service employees, the court has ignored an important and highly relevant phase of the Washington statute law and Washington case law. In so doing the court also ignores its own holding in *Spokane International Railway Company v. United States,* 72 F. (2d) 440, (CCA 9th 1934), in which at page 442, the court pointed out that

> "This criminal statute established a standard of care, failure in the observance of which would subject defendant to civil liability if such failure caused or contributed to the damage of another."

[4] *Conrad v. Cascade Timber Co.,* 166 Wash. 369, 7 P. (2d) 19.

## IV.

### Mis-interpretation of the Dalehite Case

Much space in appellants' briefs was devoted to a consideration of the *Dalehite* case. Cases were cited which hold that merely being engaged in a public function is no defense to liability of the United States.[5] The facts in the *Dalehite* case were explained in detail and fully distinguished from those in the case at bar,[6] and it was shown how the opinion's remarks regarding public firemen were dictum. Furthermore, the facts in the case at bar place it within the expressly recognized exceptions to the *Dalehite dictum.*[7] Appellants reiterate this position in petitioning for rehearing, *en banc.*

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[5] See Appellants' Reply Brief, pp. 11-12.
[6] See Appellants' Opening Brief, pp. 62-65.
[7] See Apellants' Opening Brief, pp. 73-75.

## CONCLUSION

In conclusion, Appellants submit that the departmental opinion at the outset made a major error of law in holding that liability for the prior acts and omissions as alleged in the complaint was foreclosed by the doctrine of intervening cause. By reaching this conclusion the court disposed of the legal arguments dealing with those earlier acts and omissions in a must summary manner. None of those arguments dealt with or are grounded on the duties of the servient owner toward the maintenance of an easement. The court cited the *Reed* case for a premise contrary to its holding. Equally serious is the court's cursory consideration of the fire hazard and Olympic Peninsula statutes which in themselves create a liability for negligently leaving combustible debris in the Olympic Forests.

Suffice it to say that these are only two of the grounds of liability in the earlier stages which should be given reconsideration once the doctrine of intervening cause is removed from the court's holding.

In addition, the court has mis-interpreted and mis-applied the holding in the *Dalehite* case.

On a motion for judgment on the pleadings, all well-pleaded allegations are deemed admitted.

It is submitted that Appellants should be accorded a rehearing *en banc*.

Respectfully submitted,
FERGUSON & BURDELL
W. H. FERGUSON
W. WESSELHOEFT
DONALD MCL. DAVIDSON
*Attorneys for Appellants*

## CERTIFICATE OF COUNSEL

The foregoing Petition for Rehearing is in my opinion well founded and is not interposed for delay.

W. WESSELHOEFT